Goski Trucking Corp. and its alter ego, Go Transport, Inc. *and* International Brotherhood of Teamsters, Local Union No. 478. Case 22–CA–19950

June 30, 1998

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND BRAME

On August 7, 1996, Administrative Law Judge D. Barry Morris issued the attached decision. The General Counsel and the Charging Party each filed exceptions and a supporting brief. The Respondent filed an answering brief to the other parties' exceptions. The Charging Party filed a reply brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

The complaint alleged that the Respondents Goski Trucking Corp. (GTC) and Go Transport (Go), as a single employer and/or alter egos, violated Section 8(a)(5) and (1) of the Act. Based on GTC's contractual relationship with the Union, the complaint alleged that the Respondents unlawfully failed to recognize the Union by failing to apply certain terms of the existing contract between GTC and the Union to Go employees and by failing to furnish the Union with requested information. Although the judge indicated that the complaint was barred by Section 10(b) of the Act, he found single-employer status, as the parties had stipulated, and dismissed the 8(a)(5) allegations for lack of proof that the parties had formed a 9(a) relationship. For the reasons given by the judge, we adopt the dismissal of the complaint on the merits, and thus we find it unnecessary to pass on his alter ego and 10(b) findings.

The General Counsel and the Union except, inter alia, to the judge's crediting of Goski's testimony concerning the execution of the June 1991 agreement between GTC and the Union. On examination by counsel for the Union, Goski testified that he and Daniel S. McFall, the Union's business agent, agreed to a contract on June 6, 1991, which would apply to Thomas J. Simmons and Richard Kondroski, the only GTC employees who were union members. Relying on Goski's testimony, the judge found that the parties' contract was a members-only contract and that the General Counsel had failed to show that the Union represented a majority of the Respondents' employees in the appropriate unit.[3] Therefore, he concluded that, without union majority status, the 8(a)(5) allegations must fail.

The General Counsel argues that he and the Union had no opportunity to cross-examine Goski about the execution of the June 1991 contract because some of Goski's testimony on this issue originally arose out of an offer of proof proffered by the Respondents. The Union essentially argues that McFall's contrary testimony about his June 6, 1991 meeting with Goski to discuss the 1991 contract should have been credited by the judge.

We affirm the judge's ruling that Goski's entire testimony could be considered evidence, including his earlier testimony proffered as an offer of proof, once the Union opened up the matter and cross-examined Goski about the execution of the June 1991 contract without objection by the General Counsel. In these circumstances, it was proper for the judge to permit the Respondents to then adduce evidence from Goski on the very same subject. Furthermore, the record shows that the General Counsel and the Union were afforded ample opportunity, but chose not to examine Goski on the 1991 contract and other matters relevant to this proceeding, and we reject the argument that they were prejudiced by the judge's ruling. We additionally note that the judge found only Goski and Thomas J. Simmons, the union shop steward, to be credible witnesses. We therefore find that the judge committed no error in relying on Goski's credited testimony rather than McFall's testimony. Accordingly, we find that the contentions of the General Counsel and the Union are without merit.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The Charging Party has moved to reopen the record to adduce additional evidence regarding the employment status of certain individuals employed by Respondent Goski Trucking Corp. in June 1991. The Respondent filed an opposition brief in response to the motion. The Charging Party then filed a reply brief to the opposition brief. We deny the motion. The Charging Party has failed to show that the evidence in question is newly discovered, has become available only since the close of the hearing, or otherwise satisfies the requirements of Sec. 102.48(d)(1) of the Board's Rules and Regulations. See *Silver Court Nursing Center*, 313 NLRB 1141 fn. 2 (1994).

[2] The General Counsel and the Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] The judge found that, in June 1991, GTC had approximately eight other employees in addition to Simmons and Kondroski.

Stephen J. Holroyd, Esq., for the General Counsel.
Steven S. Glassman, Esq. (Grotta, Glassman & Hoffman), of Roseland, New Jersey, for the Respondents.
Gary A. Carlson, Esq. (Kroll & Heineman), of West Orange, New Jersey, for the Union.

DECISION

STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge. This case was heard before me in Newark, New Jersey, on March 5 and 6, 1996. Upon a charge filed on June 13, 1994,[1] and amended on July 13, a complaint was issued on March 30, 1995, and amended on April 5, 1995, alleging that Goski Trucking Corp. (GTC) and its alter ego, Go Transport, Inc. (Go) violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). The complaint specifically alleged that Respondents failed to recognize the Union by failing to apply certain terms of the collective-bargaining agreement and that Respondents have failed to furnish the Union with information requested by it. Respondents filed answers denying the commission of the alleged unfair labor practices. The General Counsel has moved for the withdrawal of paragraph 14(d) of the complaint which alleged that Respondents improperly deducted healthcare contributions from employee wages. The motion is granted.

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally, and file briefs. Briefs were filed by the General Counsel and by Respondent on April 15, 1996. Pursuant to an order I issued on April 18, 1996, supplemental briefs were filed by the parties on June 10, 1996.

Upon the entire record of the case, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent GTC, a corporation, with an office and place of business in Harrison, New Jersey, has been engaged in the interstate transportation of freight. It has been admitted, and I find, that GTC is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. In addition, it has been admitted and I find, that International Brotherhood of Teamsters, Local Union No. 478 (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

The complaint alleges that GTC and Go constitute a single employer and alter egos within the meaning of the Act. The parties stipulated that GTC and Go constitute a single employer within the meaning of the Act.

Kenneth J. Goski, president of both Respondents and Thomas J. Simmons, member of the Union and shop steward, both appeared to me to be credible witnesses. In late winter 1990 or early spring of 1991, Daniel S. McFall, the union business agent, contacted Goski and requested that Goski sign a collective-bargaining agreement. Goski replied that he was unwilling to do so because he ''couldn't afford to.'' On June 6, 1991, Goski attended a meeting at the New Jersey State Board of Mediation with the state mediator and McFall. McFall stated that he wanted Goski to sign a collective-bargaining agreement. Goski credibly testified that he told those present that he would not sign a contract because he could not afford to, however, he wanted to make sure that Simmons and another employee, Richard Kondroski, continued to have pension coverage. McFall then told Goski that he must sign a contract if he wanted to continue to make pension and welfare contributions. Goski and McFall then agreed to sign a contract that would only cover Kondroski and Simmons. On questioning by counsel for the Union, Goski credibly testified:

> Q. At the time you reached agreement with Mr. McFall in June 1991 how many employees were working for Goski, is that when there were about ten or fifteen?
> A. Yes.
> Q. And you intended to pay pension benefits on behalf of two of those employees?
> A. To the Union on behalf of Tom Simmons and Rich Kondroski, pension and welfare benefits, yes.
> Q. And you intended to apply the union contract to only two employees?
> A. Yes.
> Q. You didn't intend to apply it to the others?
> A. No.
> Q. Do you happen to know whether or not that is legal?
> A. No.
> Q. Would you be surprised if I told you that that is illegal?
> A. I abided by the agreement I had with Mr. McFall.[2]

The collective-bargaining agreement was effective for 3 years, until June 14, 1994. During the 3 years Goski continued to make pension and welfare contributions on behalf of only Kondroski and Simmons. McFall testified that he did not contact Goski or visit GTC during those years because ''we had two people down there, where there were no problems with the job.'' Simmons credibly testified that he never filed a grievance during that period.

In November 1992, Goski received OTC's 1993 driver liability insurance premium. The new premium was in the amount of $221,498. Goski credibly testified that the prior year's premium had been approximately $70,000. He testified, ''I got a quote from my liability carrier which raised my premiums so high that essentially it would have put me out of business within 30 days.'' Goski credibly testified that he established Go in November 1992 because ''it had become apparent to me that I was going to be unable to secure liability insurance for my company, which at that time was Goski Trucking because of losses we had incurred for the last couple of years.'' Similarly, Simmons credibly testified

[1] All dates refer to 1994 unless otherwise specified.

[2] At the hearing I initially permitted evidence concerning the 1991 agreement only as an offer of proof. After questioning by counsel for the Union opened up the matter, I ruled that the testimony could be considered evidence and no longer as merely an offer of proof.

that he learned of the existence of Go in 1992, that he asked Goski about Go and that Goski told him that he was having insurance problems with GTC, that they were causing severe hardships for the business and that he was establishing Go because of the insurance problems.

Sometime during the winter of 1993–1994, McFall telephoned Goski and told him that it was time to renew the contract. This was the first time that Goski had heard from McFall since they met on June 6, 1991. On April 29, 1994, McFall and Goski met and signed a one-page memorandum of agreement. McFall testified that he met with Simmons in May 1994 at which time Simmons informed McFall of the existence of Go. Simmons testified, however, that it was not he who initially told McFall about Go. On June 1, McFall sent a letter to GTC requesting information, including copies of timecards and employee records, and a seniority list of employees with date of hire, job classification, and wage rates. Respondents have failed to furnish the information requested.

B. *Discussion and Conclusions*

1. Alter ego

The complaint alleges that GTC and Go constitute a single employer and alter egos within the meaning of the Act. The parties stipulated that GTC and Go constitute a single employer under the Act. In addition, the parties stipulated that GTC employees service Go customers. The criteria the Board normally looks to in deciding whether nominally separate businesses may be regarded as a single employer are common management, common ownership, centralized control of labor relations, and interrelation of operations. With respect to alter ego status, the relevant criteria include substantially identical management, business purposes, operation, equipment, customers, supervision, and ownership. See *Merchants Iron & Steel Corp*., 321 NLRB 360 (1996).

In *Perma Coatings*, 293 NLRB 803, 804 (1989), the Board stated:

> While it is true that a sincere motivation for the creation or operation of a new corporation does not preclude finding alter ego status, the absence of union animus nevertheless generally militates against finding a ''disguised continuance'' of the predecessor.

I have found that Goski established Go in November 1992 because to continue operating GTC as he had been would have involved substantially increased insurance costs. GTC had been making pension and welfare contributions on behalf of Simmons and Kondroski. Although GTC had approximately eight other employees, there is no evidence in the record that there was any request to make pension and welfare contributions on behalf of those employees as well. From the record evidence there does not appear any union motivated reason why Goski would have wanted an alter ego as a disguised continuance of GTC in November 1992. The only plausible reason from the record is that testified to by Goski, that he established Go in November 1992 because of the substantially increased insurance premium. Accordingly, I find that GTC and Go constituted a single employer within the meaning of the Act, but that Go was not the alter ego of GTC.

2. The 10(b) defense

Respondent contends that the complaint is barred by Section 10(b) of the Act because the Union had actual notice of Go's existence more than 6 months prior to filing its charge. Counsel for the General Counsel stated at the hearing that if the Union had knowledge of Go outside of the 10(b) period ''the Union would be precluded from trying to make an issue out of the alter ego status now.'' See *John Morrell & Co*., 304 NLRB 896, 901 (1991); *Consolidation Coal Co*., 277 NLRB 545, 551 (1985). I have credited Simmons' testimony that he knew of the existence of Go in 1992. The charge in this case was filed on June 13, 1994. Accordingly, Simmons, the union steward, knew of the existence of Go approximately 2 years prior to the filing of the charge. While the testimony indicates that McFall may not have known about Go's existence prior to 1994, inasmuch as Simmons was the shop steward, his knowledge is imputed to the Union. See *Teamsters Local 886*, 229 NLRB 832, 833 (1977). Simmons testified that his duties as shop steward are ''to maintain labor relations, to keep harmony on the job and just to make sure that we are running the operations in a fair manner.'' I find that Simmons acted as Respondent's agent and his knowledge of Go in 1992 is imputed to the Union. See *Carpenters Local 17 (A & M Wallboard)*, 318 NLRB 196 fn. 3 (1995); *Carpenters Local 296 (Acrom Construction)*, 305 NLRB 822 fn. 1 (1991).

3. Members only contract

I have credited Goski's testimony that in June 1991 he and McFall agreed that only Simmons and Kondroski would be covered by the collective-bargaining agreement. Although at the time GTC had approximately eight other employees, pension and welfare contributions were made only for Simmons and Kondroski.

In *Manufacturing Woodworkers Assn*., 194 NLRB 1122, 1123 (1972), the Board stated:

> A history of collective bargaining on a ''members only'' basis does not provide an adequate basis for representation nor the appropriateness of a bargaining unit such as the statute contemplates. The Board has traditionally refused to give weight to such a bargaining history, or to require its continuance, and we will not do so here.

Similarly, in *Ace-Doran Hauling & Rigging Co*., 171 NLRB 645, 646 (1968), the Board stated:

> The evidence relating to the practice under the agreements further makes it clear that the parties did not intend them to be effective collective-bargaining contracts, but instead merely regarded them as arrangements under which Respondent agreed to check off dues, health and welfare, and pension payments for union members only. The acquiescence of the Unions in Respondent's failure both to enforce the union-security provisions of the agreements and to pay health and welfare contributions for all employees (ostensibly provided by the ''contracts''), makes it clear that the parties did not believe that they were in true collective-bargaining relationships.

> Since the alleged agreements are not such as would give rise to a presumption of a majority status, we find that the General Counsel has failed to sustain his burden of proof and therefore that the complaint should be dismissed.

In *Don Mendenhall, Inc.*, 194 NLRB 1109, 1110 (1972), the Board stated:

> We must consider the alleged refusal to bargain against this background of members-only dealing between the parties. We conclude that, in the context of events, the Respondent's actions cannot be held violative of Section 8(a)(5). That section, by reference to Section 9(a), requires as a predicate for any finding of violation that the employee representative has been designated or selected as the exclusive representative of the employees. It has been settled since the early days of the Act that members-only recognition does not satisfy statutory norms.

In *Arthur Sarnow Candy Co.*, 306 NLRB 213 (1992), the Board affirmed the judge's dismissal of the complaint. The judge found that the collective-bargaining agreement had been applied only to those employees who were union members. The judge noted that the union had a shop steward at the premises, that there was no evidence that the employer attempted to hide the existence of the contract from other employees, nor was there any evidence that the employer refused to meet with the union or that it made any efforts to impede the union from talking with or having access to its employees. Id. at 215. Similarly, in this proceeding the Union had a shop steward, Simmons, on the premises. There is no indication that McFall was ever denied access to GTC employees. Instead, McFall testified that he chose not to visit because ''there were no problems.'' In addition, Section 11(c) of the collective-bargaining agreement is substantially similar to the visitation clause in *Samow*, supra. It provides ''the representatives of the Union shall be permitted at all times to enter upon the Employer's premises for the purpose of conducting the affairs of the Union in connection with any and all grievances or disputes which may arise between the Union and the Employer or the Employer and the employees.'' Furthermore, there is no evidence that Goski attempted to hide the presence of the Union or the existence of the collective-bargaining agreement from other employees. Accordingly, l conclude that the General Counsel has not established that the Union represented a majority of Respondent's employees in the appropriate unit. Therefore, Respondents have not violated Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. The Respondents, Goski Trucking Corp. and Go Transport, Inc. constitute a single employer within the meaning of the Act.
2. GTC is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
3. The Union is a labor organization within the meaning of Section 2(5) of the Act.
4. Respondent has not violated the Act in any manner as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The complaint is dismissed.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.